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COMPLAINT

(Filed June 19, 1970)

Plaintiffs by their Attorneys, Ripple and Chambers, P.C. complain of defendants and declare:

Count I

1. That plaintiffs are citizens of the Province of Ontario; that defendants are citizens of or established in the State of Michigan; and that the matter in controversy exclusive of interest and costs exceed Ten Thousand ($10,000.00) Dollars.

2. That the defendants are occupiers or in possession of certain premises situated in Wayne County, Michigan, adjacent to or in proximity to the Detroit River, in the Cities of Detroit, River Rouge and Ecorse, whereupon they operate certain manufacting plants or power plants.

3. That the plaintiffs are residents of the Township of Sandwich West, Essex County, Ontario and occupiers of various premises in proximity to the Detroit River and across the same from defendants' aforesaid premises.

4. That there is a common question of law or fact affecting the rights of these plaintiffs and a common relief is sought, and that this action is brought as a class action under the provisions of Federal Rule 23(a)(3).

5. That the defendants now operate and have been operating since prior to 1935 activities on their premises from which they have regularly and continuously discharged or permitted to be discharged into the air soot, smoke, gases, fumes, fly ash, dust, industrial dust, and related substances.

6. That at all times mentioned herein the aforesaid substances were carried by air currents and gases onto the premises of plaintiffs.

7. That the discharges of these substances were of such volume and regularity and of such a noxious character that the same constituted a nuisance.

8. That the aforesaid discharges were in violation of the Ordinances of the City of Detroit, River Rouge and Ecorse and of the regulations of the State of Michigan Administrative Code and of the regulations of the Wayne County Health Department.

9. That as a direct and proximate result thereof the plaintiffs, James Michie and Victoria Michie, who are husband and wife respectively, have sustained to their damage:

(a) Damages to their property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

(e) That the plaintiff, Victoria Michie, has sustained injuries and disease and impairment of health with respect to her nose, throat, lungs, eyes, respiratory passages and allergenic reactions with resulting pain and suffering.

(f) That the plaintiff, James Michie, has sustained to his damage medical expenses incurred on behalf of his wife, Victoria Michie, on account of her injuries as aforesaid.

(g) That the plaintiff, James Michie, has sustained loss of the consortium of his wife, Victoria, on account of her injuries as aforesaid.

10. That as a direct and proximate result thereof the plaintiffs, Anthony Hudvagner and Lois Hudvagner, who are husband and wife and are parents of the plaintiffs, Kevin and Michael Hudvagner, have sustained to their damage the following:

(a) Damage to their property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

(e) That the plaintiffs, Anthony Hudvagner, Lois Hudvagner, Kevin Hudvagner and Michael Hudvagner, have sustained personal injuries or disease and impairment of health with respect to their nose, throat, lungs, eyes, respiratory passages, and allergenic reactions, with resulting pain and suffering.

(f) That the plaintiff, Anthony Hudvagner, has sustained to his damage the medical and hospital expenses incurred on behalf of his wife, Lois, and his children, Kevin and Michael Hudvagner, on account of their injuries as aforesaid.

(g) That the plaintiff, Anthony Hudvagner has sustained the loss of the consortium of his wife, Lois Hudvagner, on account of her injuries as aforesaid.

11. That as a direct and proximate result thereof the plaintiffs, Edwin Miller and Sarah Miller, who are husband and wife and are parents of the plaintiffs, Carolyn Miller and Susan Miller, have sustained to their damage:

(a) Damages to their property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

(e) That the plaintiffs, Carolyn Miller and Susan Miller have sustained personal injury or disease and impairment of health with respect to their nose, throat, lungs, eyes, respiratory passages, and allergenic reactions, with resulting pain and suffering.

12. That as a direct and proximate result thereof the plaintiffs, Carl Moore and Juliann Moore, who are husband and wife respectively and are parents of the plaintiffs Carl Moore, Jr., Marilyn Moore, and Melody Moore, sustained to their damage:

(a) Damage to their property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

(c) That the plaintiffs, Juliann Moore, Carl Moore, Jr., Marilyn Moore and Melody Moore, have sustained personal injuries or disease and impairment of health with respect to their nose, throat, lungs, eyes, respiratory passages, and allergenic reaction with resulting pain and suffering.

(f) That the plaintiff, Carl Moore, sustained to his damage medical, hospital and related expenses incurred on behalf of his wife and children on account of their injuries as aforesaid.

(g) That the plaintiff, Carl Moore, sustained the loss of the consortium of his wife, Juliann Moore, on account of her injuries as aforesaid.

13. That as a direct and proximate result thereof the plaintiff, Bernice Shepherd, has sustained to her damage the following:

(a) Damage to her property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of her premises.

(e) That the plaintiffs, Bernice Shepherd and Sharon Shepherd, who are mother and daughter, have sustained personal injury or disease and impairment of health with respect to their nose, throat, lungs, eyes, respiratory passages and allergenic reactions with resulting pain and suffering.

(f) That the plaintiff, Bernice Shepherd has sustained to her damage the hospital, medical and related expenses incurred on behalf of her daughter, Sharon Shepherd, on account of her injuries as aforesaid.

14. That as a direct and proximate result thereof the plaintiffs, Joseph Ubene and Jeannine Ubene, who are husband and wife and parents of Philip Ubene, Rose-Ann Ubene and Roxanne Ubene, have sustained to their damage the following:

(a) Damage to their property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

(e) That the plaintiffs, Philip Ubene, Rose-Ann Ubene, and Roxanne Ubene, have sustained personal injuries or disease and impairment of health with respect to their nose, throat, lungs, eyes, respiratory passages and allergenic reactions, with resulting pain and suffering.

15. That as a direct and proximate result thereof the plaintiffs, Ernest Vegh and Kaye Vegh, who are husband and wife respectively have sustained to their damage:

(a) Damage to their property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

16. That as a direct and proximate result thereof the plaintiffs, Ernest Warnholz and Hazel Warnholz, who are husband and wife respectively, have sustained to their damage the following:

(a) Damage to their property and the expenses of maintenance, repairs, corrections and preventions of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

(e) That the plaintiff, Hazel Warnholz, sustained personal injuries or disease and impairment of health with respect to their nose, throat, lungs, eyes, respiratory passages, and allergenic reaction with resulting pain and suffering.

(f) That the plaintiff, Ernest Warnholz, has sustained to his damage the medical and hospital expenses incurred on behalf of his wife, Hazel, on account of her injuries as aforesaid.

(g) That the plaintiff, Ernest Warnholz, has sustained the loss of the consortium of his wife, Hazel Warnholz, on account of her injuries as aforesaid.

17. That as a direct and proximate result thereof the plaintiffs, Herbert Luppke and Rose Luppke, who are husband and wife have sustained to their damage the following:

(a) Damage to their property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

18. That as a direct and proximate result thereof the plaintiffs, Adam Gungle and Helen Gungle, who are husband and wife and are parents of the plaintiff, Gayle Gungle, have sustained to their damage the following:

(a) Damage to their property and the expense of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

(e) That the plaintiff, Gayle Gungle, has sustained to her damage personal injuries or disease and impairment of health with respect to her nose, throat, lungs, eyes, respiratory passages, and allergenic reactions, with resulting pain and suffering.

(f) That the plaintiff, Adam Gungle, has sustained to his damage the medical and hospital expenses incurred on behalf of his daughter, Gayle Gungle, on account of her injuries as aforesaid.

19. That as a direct and proximate result thereof the plaintiffs, Robert Olsen and Margaret Olsen, who are hus-

band and wife and parents of Bradley Olsen, have sustained to their damage the following:

(a) Damage to their property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

(e) That the plaintiffs, Margaret Olsen and Bradley Olsen, have sustained personal injuries or disease and impairment of health with respect to their nose, throat, lungs, eyes, respiratory passages, and allergenic reactions, with resulting pain and suffering.

(f) That the plaintiff, Robert Olsen, has sustained to his damage the medical and hospital expenses incurred on behalf of his wife, Margaret Olsen and his son, Bradley Olsen, on account of her injuries as aforesaid.

(g) That the plaintiff, Robert Olsen, has sustained the loss of the consortium of his wife, Margaret Olsen, on account of her injuries as aforesaid.

20. That as a direct and proximate result thereof the plaintiffs, Bernard Mailloux and Gloria Mailloux, who are husband and wife respectively have sustained to their damage the following:

(a) Damage to their property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

21. That as a direct and proximate result thereof the plaintiffs, Martin Dupuis and Donna Dupuis, who are husband and wife respectively, have sustained to their damage the following:

(a) Damage to their property and the expenses of maintenance, repairs, corrections and prevention of same.

(b) Loss of the normal use and enjoyment of their premises.

(c) Annoyance, inconvenience and discomfort.

(d) Diminution in the value of their premises.

Wherefore, plaintiffs pray this court grant them compensatory damages against the defendants in the sums of:

For James Michie and Victoria Michie, jointly, Thirty-Five Thousand ($35,000.00) Dollars; for Victoria Michie, Eleven Thousand ($11,000.00) Dollars and for James Michie, Eleven Thousand ($11,000.00) Dollars.

For Anthony Hudvagner and Lois Hudvagner, jointly, Fifteen Thousand ($15,000.00) Dollars, for Anthony Hudvagner, Twenty-Five Thousand ($25,000.00) Dollars, for Lois Hudvagner, Eleven Thousand ($11,000.00) Dollars, for Kevin Hudvagner, a minor, Eleven Thousand ($11,000.00) Dollars, and for Michael Hudvagner, a minor, Eleven Thousand ($11,000.00) Dollars.

For Edwin Miller and Sarah Miller, jointly, Thirty Thousand ($30,000.00) Dollars, for Carolyn Miller, a minor, Eleven Thousand ($11,000.00) Dollars and for Susan Miller, a minor, Eleven Thousand ($11,000.00) Dollars.

For Carl Moore and Juliann Moore, jointly, Seventy Thousand ($70,000.00) Dollars, for Juliann Moore, Thirty Five Thousand ($35,000.00) Dollars, for Carl Moore, Fifteen Thousand ($15,000.00) Dollars, for Carl Moore, Jr., a minor, Eleven Thousand ($11,000.00) Dollars, for Marilyn Moore, a minor, Eleven Thousand ($11,000.00) Dollars, and for Melody Moore, a minor, Eleven Thousand ($11,000.00) Dollars.

For Bernice Shepherd Thirty Thousand ($30,000.00) Dollars, for Sharon Shepherd, a minor, Eleven Thousand ($11,000.00) Dollars.

For Joseph Ubene and Jeannine Ubene, jointly, Forty Thousand ($40,000.00) Dollars, for Philip Ubene, a minor, Eleven Thousand ($11,000.00) Dollars, for Rose-Ann Ubene, a minor, Eleven Thousand ($11,000.00) Dollars and for Roxanne Ubene, a minor Eleven Thousand ($11,000.00) Dollars.

For Ernest Vegh and Kaye Vegh, jointly Forty Thousand ($40,000.00).

For Ernest Warnholz and Hazel Warnholz, jointly, Thirty-Five Thousand ($35,000.00) Dollars, for Ernest Warnholz, Fifteen ($15,000.00) Dollars, for Hazel Warnholz, Eleven Thousand ($11,000.00) Dollars.

For Herbert Luppke and Rose Luppke, jointly, Sixty Thousand ($60,000.00) Dollars.

For Adam Gungle and Helen Gungle, jointly, Thirty Thousand ($30,000.00) Dollars, for Gary Gungle, a minor,

Eleven Thousand ($11,000.00) and for Adams Gungle, Eleven Thousand ($11,000.00) Dollars.

For Robert Olsen and Margaret Olsen, jointly, Forty Thousand ($40,000.00) Dollars, for Margaret Olsen, Eleven Thousand ($11,000.00) Dollars, for Bradley Olsen, a minor, Eleven Thousand ($11,000.00) Dollars and for Robert Olsen, Eleven Thousand ($11,000.00) Dollars.

For Bernard Mailloux and Gloria Mailloux, jointly, Thirty Thousand ($30,000.00) Dollars.

For Martin Dupuis and Donna Dupuis, jointly, Thirty Thousand ($30,000.00) Dollars.

Plus interest from the date of filing of this Complaint cost and attorney fees.

Count II

1-8. Plaintiffs reallege paragraphs one through eight of Count I above.

9. That the aforesaid wrongful and unlawful activities and the creation and maintenance of the nuisance by the defendants were done with wilful and wanton disregard for the safety, health, comfort, welfare and rights of these plaintiffs.

Wherefore plaintiffs pray that this court grant them jointly punitive damages against the defendants in the sum of One Million ($1,000,000.00) Dollars from each defendant.

Ripple and Chambers, P.C.
By /s/ Donnelly W. Hadden
Attorney for Plaintiffs
1720 First Federal Building
Detroit, Michigan 48226
WO 1-0130

Dated: June 19, 1970

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a trial by jury in the above entitled cause.

Ripple and Chambers, P.C.
By /s/ Donnelly W. Hadden
Attorney for Plaintiffs
1720 First Federal Building
Detroit, Michigan 48226
WO 1-0130

Dated: June 19, 1970

ORDER AMENDING COMPLAINT

At a session of said court held in the Federal Building, Detroit this 2/9/71.

Present: Honorable Damon J. Keith, Federal Judge.

A Motion was brought by the defendants to dismiss this action as a class action. The plaintiffs concede the same but move to amend Complaint and withdraw their allegations of class action and substitute allegations of joinder under the provisions of Rule 20 (a); and this court being fully advised:

It is *ORDERED* that the plaintiffs' allegations containing a class action are hereby strickened from paragraph four of their Complaint and paragraph four of that Complaint is hereby amended to read as follows:

4. That these plaintiffs are joined under the provisions of the Federal Rule 20 (a).

Damon J. Keith

Approved as to form:
Richard Ford
Leslie Fleming
Thomas D. Beebe

ANSWER OF DEFENDANT THE DETROIT EDISON COMPANY

(Filed July 28, 1970)

The defendant The Detroit Edison Company separately and severally answers the complaint in this cause as follows:

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

This action is alleged (paragraph 4 of the complaint) to be brought as a class action and the complaint does not contain sufficient allegations to qualify it as such, and no class is described or identified.

Third Defense

There is a misjoinder of parties plaintiff and the complaint states no facts showing any cause of action common to the named plaintiffs.

Fourth Defense

The nuisance, if any, alleged in the complaint is a public nuisance and the plaintiffs do not allege themselves to have any official capacity or to be entitled to sue on behalf of the public at large.

Fifth Defense

There is a misjoinder of parties defendant; the complaint fails to charge defendant Edison with any act done or omitted in concert with the other defendants; and defendant Edison claims the benefit of a motion for severance and that it be dismissed out of this case or in the alternative that all other defendants be dismissed out of this case.

Sixth Defense

This action was not commenced within the time required by law after the accrual of the right of action alleged in the complaint.

Seventh Defense

The plaintiffs are guilty of laches and they and their predecessors in title have slumbered upon their rights, in that the supposed nuisance is alleged to have existed since prior to 1935.

Eighth Defense

As to Count I of the complaint defendant Edison admits the allegations of paragraphs 1, 2 and 5 in part as stated below; is without knowledge sufficient to answer paragraphs 3 and 6; denies the allegations of paragraphs 4, 7 and 8; denies the allegations of paragraphs 9 to 21 inclusive insofar as said paragraphs may be intended to reallege any tortious act or omission of defendant Edison, and is without knowledge sufficient to answer all other matters in said paragraphs.

As to Count II of the complaint defendant Edison realleges its answers to paragraphs 1 to 8 inclusive of Count

I; denies the allegations of paragraph 9 insofar as they relate to defendant Edison; for want of knowledge neither admits nor denies said allegations insofar as they may relate to other defendants.

1. As to paragraph 1 of said Counts defendant Edison shows that it is a corporation organized and existing under the laws of the States of New York and of Michigan and has its principal business office at Detroit, Michigan. For want of knowledge it neither admits nor denies the other allegations of said paragraph.

2. As to paragraph 2 of said Counts defendant Edison admits that it operates power plants in Detroit and in River Rouge adjacent to the Detroit River; denies that it operates any plant in Ecorse; and for want of knowledge neither admits nor denies the other allegations of said paragraph.

3. For answer to paragraph 3 of said Counts, defendant Edison for want of knowledge neither admits nor denies the allegations thereof insofar as said allegations relate to the other defendants. Insofar as said allegations relate to defendant Edison they are denied except as follows:

a) Beginning about 1903 in Detroit and about 1954 in River Rouge defendant Edison has been engaged in the manufacture of electricity for public utility distribution to an area of about 7,600 square miles with a population of over 4,000,000 people. Electricity is a necessity and defendant Edison is the sole source of supply thereof as to most of said territory and most of said people. Defendant Edison's lines are interconnected with public utility systems in other states and in Ontario, to which jurisdiction defendant Edison furnishes electricity from time to time.

b) There is not and there has never been any known way for the economical generation of electricity in this lo-

cality except as requires the emission of limited amounts of smoke and soot. Defendant Edison at all times has used all reasonable efforts and has so designed, redesigned, constructed, reconstructed and operated its plants so as to keep smoke and soot at a minimum. Large sums of money have been expended in designing, purchasing and installing smoke arresters, dust collectors, etc. The emission of smoke and soot from defendant Edison's plants is not and has never been unreasonable.

c) Defendant Edison's plants are situated in a heavily industralized area wherein considerable smoke and soot has always been generated by the activities of other firms and corporations not acting in concert with defendant Edison. The plaintiffs' lands and places of residence are remote from said area. On information and belief defendant Edison avers that the conditions of which plaintiffs complain existed if they ever existed, for a long time before plaintiffs acquired said lands or resided thereon.

Wherefore, defendant Edison prays that it may be dismissed out of this Court with its costs to be taxed.

Fischer, Sprague, Franklin & Ford
Richard Ford
/s/ George A. Leininger, Jr.
Attorneys for Defendant The
Detroit Edison Company
1100 Commonwealth Building
Detroit, Michigan 48226
962-5210

Dated: July 28, 1970

ANSWER OF DEFENDANT ALLIED CHEMICAL CORPORATION

(Filed August 14, 1970)

Comes now defendant Allied Chemical Corporation and severing from the co-defendants answers the complaint on file herein as follows:

First Defense

There is a misjoinder of parties defendants; the complaint does not aver that defendants are joint tort-feasors and there is nothing on the face of the complaint from which it could be concluded that plaintiffs' claims against the three defendants arose out of the same transaction or occurrence, or out of the same series of transactions or occurrences; this defendant should be dropped as a party defendant in this action, its name stricken from the summons and complaint and all other pleadings and the action continued without Allied Chemical Corporation as a defendant to the same effect as if it had never been joined as a party, or in the alternative Great Lakes Steel and The Detroit Edison Company should be dropped as parties defendant in this action, their names stricken from the summons and complaint and all other pleadings and the action continued without them to the same effect as if they had never been joined as parties.

Second Defense

There is a misjoinder of parties plaintiff; the complaint does not aver any right to relief by plaintiffs jointly and there are no averments from which it could be concluded that plaintiffs' claims against this defendant arose out of

the same transaction or occurrence or out of the same series of transactions or occurrences; all the plaintiffs except James Michie should be dropped as parties plaintiff in this action, their names stricken from the summons and complaint and all other pleadings and the action continued without the parties plaintiff other than James Michie to the same effect as if they had never been joined as parties.

Third Defense

This action is not maintainable as a class action; the complaint does not aver the prerequisites to a class action required by Rule 23 (a) in that there is no averment that the class is so numerous that joinder of all members is impracticable or that the representative parties will fairly and adequately protect the interests of the class; the complaint fails to aver any of the requirements of Rule 23 (b); the extent and nature of the class is not described or identified.

Fourth Defense

The Court lacks jurisdiction because the amount actually in controversy for each plaintiff is less than $10,000.00 exclusive of interest and costs and any claim of damages in excess of $10,000.00 is not made in good faith.

Fifth Defense

The complaint fails to state a claim against this defendant upon which relief can be granted.

Sixth Defense

The claims of the individual plaintiffs stated in the complaint did not accrue within three years before the com-

mencement of the action and are therefore barred by the applicable statute of limitations.

Seventh Defense

The face of the complaint shows the damages alleged by the various plaintiffs have accrued over periods of time of up to thirty-five years and by virtue of the applicable statute of limitations the liability, if any, of this defendant would not extend to any damages incurred more than three years prior to the commencement of this action.

Eighth Defense

Defendant denies each and every allegation contained in the complaint not herein specifically admitted.

1. Defendant admits that it is a New York corporation and occupies certain premises situated in Detroit, Wayne County, Michigan adjacent to or in proximity of the Detroit River whereupon defendant has operated and now operates divers facilities.

2. defendant admits that in the operation of its divers facilities some smoke, gases, fumes and dust have unavoidably been discharged into the air.

Wherefore, defendant Allied Chemical Corporation prays that it be granted relief in accordance with the defenses herein stated and that the action be dismissed with defendant's costs to be taxed.

Butzel, Long, Gust, Klein & Van Zile
By /s/ Leslie W. Fleming
Attorneys for Allied Chemical
1881 First National Building
Detroit, Michigan 48226
963-8142

Dated: August 13, 1970

ANSWER OF DEFENDANT NATIONAL STEEL CORPORATION

(Filed August 14, 1970)

In answer to the Complaint filed in this cause National Steel Corporation says:

First Defense

The Complaint fails to state a claim upon which relief can be granted.

Second Defense

There is a misjoinder of plaintiffs since the Complaint fails to contain allegations showing that joinder of plaintiffs is required under RCP 19 or showing that joinder of plaintiffs is permissible under RCP 20.

Third Defense

There is a misjoinder of defendants since the Complaint fails to contain allegations showing that any defendant is a necessary part to the action against the other defendants requiring joinder under RCP 19, or showing that joinder of defendants is permissible under RCP 20.

Fourth Defense

The Complaint fails to set forth allegations sufficient to show that this suit may be brought as a class action under RCP 23, and this suit is not one which may be brought as a class action under RCP 23.

Fifth Defense

This action was not commenced within the time required by law after the accrual of the right of action, if any, alleged in the Complaint.

Sixth Defense

If plaintiffs have any cause of action as alleged in the Complaint their failure to institute this suit until many years after the conditions described in the Complaint commenced amount to laches and they may not now be heard to complain.

Seventh Defense

If the facts alleged in the Complaint are true and if the conditions therein described have existed for the period of time therein set forth, defendants and each of them have acquired a prescriptive right to continue the activities complained of without liability to plaintiffs, irrespective of whether or not such activities amounted to a nuisance.

Eighth Defense

As to Count I of the Complaint, National Steel Corporation admits the allegations of paragraph 1 to the effect that Defendants are established in Michigan; admits that the defendants separately occupy certain premises in the cities of Detroit, River Rouge or Ecorse upon which they separately operate certain manufacturing plants or power plants; admits that this defendants' plants have since prior to 1935 discharged into the air some soot, smoke, gases and/or other related substances; has insufficient knowledge to answer the allegations of paragraphs 3 and 6, the alle-

gations with respect to plaintiffs' claims of damages set forth in paragraphs 9 through 21, and the remaining allegations of paragraph 1; and denies the remaining allegations of Count I.

As to Count II, defendants repeat their answers to the allegations contained in paragraphs 1 through 8 of Count I and deny the allegations of paragraph 9.

Hill, Lewis, Adams, Goodrich & Tate
By: /s/ Edward T. Goodrich
Attorneys for National Steel Corporation
3700 Penobscot Building
Detroit, Michigan 48226
Tel. 962-6485

Dated: August 17, 1970

MOTION TO DISMISS PLAINTIFFS' CLAIMS AGAINST ALLIED CHEMICAL CORPORATION FOR LACK OF JURISDICTION

(Filed August 5, 1971)

Allied Chemical Corporation, one of the defendants herein, by its attorneys, Butzel, Long, Gust, Klein & Van Zile, moves the Court to enter orders dismissing the claims of each of the several plaintiffs against this defendant for lack of jurisdiction for the reason that as between each of the said plaintiffs and this defendant the matter in controversy does not exceed the required jurisdictional sum or value of $10,000.00.

The plaintiffs' complaint seeks only damages and the amount claimed by each of the plaintiffs is stated in a

single sum. There are three named defendants but the complaint does not allege that the said defendants are joint tortfeasors or that the defendants are jointly liable. No separate amount is stated or claim alleged against Allied Chemical Corporation.

The three defendants are not joint tortfeasors nor jointly liable. To meet the jurisdictional requirements of the federal court the claim of each of the individual plaintiffs against each of the defendants must be in excess of $10,000.00.

Butzel, Long, Gust, Klein & Van Zile
By: /s/ Leslie W. Fleming
Attorneys for Defendant Allied Chemical Corporation
1881 First National Building
Detroit, Michigan 48226
963-8142

MOTION TO DISMISS PLAINTIFFS' CLAIMS AGAINST THE DETROIT EDISON COMPANY FOR LACK OF JURISDICTION

(Filed September 17, 1971)

The Detroit Edison Company one of the Defendants herein, by its attorneys, Fischer, Franklin & Ford, shows that on or about September 16, 1971 said attorneys requested the consent of Plaintiffs' attorneys to this Motion, which consent was not obtained. Defendant moves the Court to enter orders dismissing the claims of each of the several Plaintiffs against this Defendant for lack of jurisdiction for the reason that as between each of the said Plaintiffs and this Defendant the matter in controversy does not exceed the required jurisdictional sum or value of $10,000.00.

The Plaintiffs' Complaint seeks only damages and the amount claimed by each of the Plaintiffs is stated in a single sum. There are three named Defendants but the Complaint does not allege that the said Defendants are joint tortfeasors or that the Defendants are jointly liable. No separate amount is stated or claim alleged against The Detroit Edison Company.

The three Defendants are not joint tortfeasors nor jointly liable. To meet the jurisdictional requirements of the Federal Court the claim of each of the individual Plaintiffs against each of the Defendants must be in excess of $10,000.00.

The Brief of Allied Chemical Corporation in support of its Motion to Dismiss for Lack of Jurisdiction is hereby adopted by The Detroit Edison Company in support of the foregoing Motion.

Fischer, Franklin & Ford
By /s/ Richard Ford
Attorneys for Defendant, The Detroit Edison Company
1700 Guardian Building
Detroit, Michigan 48226
962-5210

Dated: September 16, 1971

MOTION TO DISMISS THE CLAIMS OF CERTAIN PLAINTIFFS FOR LACK OF JURISDICTION

(Filed September 21, 1971)

GREAT LAKES STEEL, a division of National Steel Corporation, one of the defendants herein, by its attorneys, ALEXANDER, BUCHANAN & SEAVITT shows that on or about September 21, 1961 said attorneys requested the consent of plaintiffs' attorneys to this Motion, which consent was not obtained. The

Great Lakes Steel Corporation moves the Court to enter Orders dismissing the claims of:

James and Victoria Michie, jointly
James Michie, individually
Anthony, Lois, Kevin and Michael Hudvagner
Edwin, Sarah and Susan Miller
Bernice Shephard
Joseph, Jeannine, Philip, Rose Ann and Roxanne Ubene
Ernest and Kaye Vegh
Ernest Warnolz
Adam and Helen Gungle
Robert Olsen
Bernard and Gloria Mailloux
Martin and Donna Dupuis

for the reason that the amount in controversy between each said plaintiff and all or any one of the defendants herein does not exceed the sum or value of $10,000.

This Motion is based on the pleadings and depositions taken in this case and in particular the following testimony given by the above plaintiffs in their depositions.

James Michie

The present value of the Michies' home is at least equal to its cost – Deposition of James Michie, P.19, Deposition of Victoria Michie, P. 4.

Medical expense paid by James Michie for Victorie Michie was approximately $100.00. The value of Mr. Michie's loss of consortium is relatively minor – Deposition of James Michie, PP. 29-34.

Anthony, Lois, Kevin and Michael Hudvagner

Mr. and Mrs. Hudvagner sold their hole at a price of $500.00 less than their purchase price plus the cost of improvements made by them – Deposition of Anthony Hudvagner, PP. 4,6.

The illnesses of each member of the family were minor and apparently involved little or no out-of-pocket expenses – Deposi-

tion of Anthony Hudvagner, pp. 14-24, Deposition of Lois Hudvagner, PP. 7-16.

Edwin, Sarah and Susan Miller

The property damage claims of the Millers aggregate less than $3,000.00 – Deposition of Edwin Miller, PP. 7-10.

Little or no out-of-pocket expense has been incurred for the children – Deposition of Edwin Miller, P. 20.

The claims of Susan Miller concern minor illnesses not requiring hospitalization or doctor's care – deposition of Edwin Miller, P. 21.

Bernice Shepherd

Mrs. Shepherd's claims include minor property damage and minor illnesses involving little or no out-of-pocket expense – See generally Deposition of Bernice Shepherd, PP. 13-32.

Joseph, Jeannine, Philip, Rose Ann and Roxanne Ubene

The Ubenes' home has not depreciated in value – Deposition of Jeannine Ubene, P. 3.

The damage to automobiles does not exceed $250.00. No damages to furniture are claimed – Deposition of Jeannine Ubene, PP. 8-11.

The only medical claims of the Ubenes are for reimbursement for their expenditures for vitamins involving between $100.00 and $200.00 annually – Deposition of Jeannine Ubene, PP. 19-20.

Ernest and Kaye Vegh

The value of the Veghs' home has substantially increased – Deposition of Ernest Vegh, PP. 4, 23.

Claim for damages to their property are under $3,000.00 Deposition of Ernest Vegh, PP. 13-16.

Ernest Warnolz

The value of Mr. Warnolz' property has substantially increased – Deposition of Ernest Warnolz, PP. 6 and 7.

Adam and Helen Gungle

The value of Mrs. Gungle's home has substantially increased – Deposition of Helen Gungle, P. 3.

The only material claim of Adam Gungle is for expenses which are attributable to the illnesses of Gayle Gungle which do not exceed $5,000.00 – Deposition of Adam Gungle, PP. 14 and 15.

Robert Olsen

The diminution in value of the Olsens' home is at most $5,000.00 – Deposition of Robert Olsen, PP. 3,8,9.

The claimed property damage does not exceed $3,000.00 – Deposition of Robert Olsen, PP. 7, 8 and 10.

The value of Mr. Olsen's claim for loss of consortium is trivial at most – Deposition of Robert Olsen, PP. 18 and 21.

Bernard and Gloria Mailloux

The decrease in the value of the Maillous' home is not more than $6,000.00 – Deposition of Bernard Maillous, P. 5.

The damages to their personal property is under $1,000.00 – Deposition of Bernard Mailloux, PP. 14 and 16.

Martin and Donna Dupuis

The value of the Dupuis' home apparently has increased – Deposition of Martin Dupuis, P. 4, Deposition of Donna Dupuis, P. 2.

ALEXANDER, BUCHANAN & SEAVITT

By: _____

Robert J. Stowe
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MEMORANDUM OPINION DENYING MOTION TO DISMISS

(Filed November 10, 1971)

The complaint in this matter alleges that defendants, in the operation of their respective plants, discharge certain noxious pollutants into the air causing damages to plaintiffs health and property. Jurisdiction is founded on diversity of citizenship, defendants being citizens of Michigan and plaintiffs of the Province of Ontario, Canada.

The motion to dismiss is based on an argument that the plaintiffs have failed to satisfy the $10,000.00 amount in controversy requirement for diversity actions under 28 U.S.C.A. § 1332. Defendants contend that plaintiffs must satisfy this requirement as between each and every plaintiff and defendant. They argue that there is no joint liability for the acts complained of under Michigan law and thus defendants can not be considered joint tortfeasors and a separate jurisdictional amount must be shown by each plaintiff.

It is also contended that any claim for punitive damages by plaintiffs is "merely colorable" and may not be added to actual damages to arrive at the jurisdictional sum and further that even if allowable it could be claimed only by plaintiffs "individually inasmuch as their claims for actual damages are individual and not joint".

Plaintiffs claim that defendants are jointly liable under Michigan law because the injuries allegedly accruing to plaintiffs are not separable in terms of which act by which defendant caused any of the injuries alleged.

Plaintiffs further argue that punitive or exemplary damages are proper elements in determining the requisite jurisdictional amount.

For reasons that follow this court is of the opinion that the requirements of 28 U.S.C.A. § 1332 are satisfied in the instant matter.

It is clear that Michigan law is controlling on the question of whether the defendants may be held jointly liable for the allegedly tortious conduct and on the question of whether punitive damages may be included in the computation of the jurisdictional amount. *Erie R.R. v. Thompkins*, 304 U.S. 64.

Defendants' position is that they are not jointly liable for the alleged injuries to plaintiffs on the theory that the alleged injuries to the plaintiffs are not inseparable, and the acts of the alleged tortfeasors are separable. They cite *Cooley*, Torts (4th ed), wherein it is stated that merely because different parties pollute the atmosphere, that is commit separate wrongs, there is no reason why a plaintiff should be allowed recovery even though the separate wrongs culminate in an injury to plaintiff, responsibility for which cannot be divided among the various tortfeasors.

This court is of the view that this is not the state of the law in Michigan with respect to air pollution. In the absence of any Michigan cases on point, analogous Michigan cases in the automobile negligence area involving questions of joint liability after the simultaneous impact of vehicles and resultant injuries, are instructive.

In *Watts v. Smith*, 375 Mich. 120, quoting *Meier v. Holt*, 347 Mich 430, the Michigan Supreme Court said:

> "Although it is not always definitely so stated, the rules seem to have become generally established that,

> although there is no concert of action between tortfeasors, if the cumulative effects of their acts is a single indivisible injury which it cannot certainly be said would have resulted but for the concurrence of said acts the actors are to be held liable as joint tortfeasors."

In *Maddux v. Donaldson*, 362 Mich. 425 the Michigan Supreme Court cites *Landers v. East Texas Salt Water Disposal Company*, 151 Tex. 251, 248 S.W. 2d 731, a pollution case, in support of the above stated proposition. The court indicated that

> ". . . [i]t is clear that there is a manifest unfairness in 'putting on the injured party the impossible burden of proving the specific shares of harm done by each. . . . Such results are simply the law's callous dullness to innocent sufferers. One would think that the obvious meaness of letting wrongdoers go scot free in such cases would cause the courts to think twice and to suspect some fallacy in their rule of law'."

Plaintiffs contend that the *Maddux*, *id.* and *Watts*, *supra*, language applies here since there is no possibility of dividing the injuries herein alleged to have occurred and that it is impossible to judge which of the alleged tortfeasors caused what harm.

It is the opinion of this court that the rule of *Maddux*, *supra*, and *Landers*, *supra*, cited therein is the better, and applicable rule in this air pollution case. Plaintiffs will be allowed to aggregate their claims in order to satisfy the jurisdictional amount requirement because this court finds that the alleged injuries create a common and undivided interest among the several plaintiffs. *Neville v. Delta Insurance Co.*, D.C. Minn. 1968, 45 F.R.D. 345, and

that defendants, should liability be proven, are joint tort-feasors.

It is a further finding of this court that the punitive damages alleged by plaintiffs are also properly added to the actual damages and may be considered in the computation of the jurisdictional amount. It is clear that if the state where the federal court sits allows the recovery of exemplary damages these damages may be included. *Bell v. Preferred Life Assurance Society,* 320 U.S. 238. In Michigan exemplary damages may be recovered ". . . when injuries are inflicted intentionally or occur through negligence amounting to reckless or willful and wanton behavior"; *Ross v. Leggett,* 61 Mich 445 (1886); see also *Fleischer* v. *Buccilli,* 13 Mich App 135 (1968); *Oppenhuizer v. Wennersten,* 2 Mich App 288 (1966). Plaintiffs' pleadings allege such behavior and their claim does not fall within the "merely colorable" category condemned in *St. Paul Mercury Indemnity Company v. Red Cab Co.,* 333 U.S. 283. If plaintiffs can sustain the allegations made in the briefs and pleadings, punitive damages may be assessed by the trier of fact.

Defendants' motion to dismiss is denied.

Damon J. Keith
District Judge

Dated: 11-10-71

MOTION OF DEFENDANTS FOR RECONSIDERATION OR REHEARING ON MOTIONS TO DISMISS FOR LACK OF JURISDICTION

(Filed December 8, 1972)

Defendants move the Court to reconsider, or if necessary grant a rehearing on, defendants' motions to dismiss the claim of each of the several plaintiffs for lack of jurisdiction for the reason that as between each of the said plaintiffs and each defendant the matter in controversy does not exceed the jurisdictional sum or value of $10,000.00 required for actions based upon diversity under 28 USC §1332.

In support of the aforesaid motions defendants say:

Reconsideration of defendants' motions to dismiss for lack of jurisdiction should be permitted since no order has been entered on the original motions although a memorandum opinion denying the motions was filed by the Court. If granting of a rehearing is required the grounds therefor exist as are hereinafter set forth. The aforesaid opinion contains erroneous findings and conclusions of law based upon palpable defects by which the Court has been misled. Correction thereof would result in dismissal of plaintiffs' claims against these defendants for lack of jurisdiction instead of proceeding with a long, complex and costly jury trial.

In Count I the complaint alleges on behalf of each individual plaintiff spurious claims of injury to persons and property caused by air pollution constituting a nuisance and prays the Court "grant them compensatory damages against the defendants" in sums of $11,000.00 or more separately stated for each plaintiff.

The complaint does not allege that defendants are joint tortfeasors or that defendants are jointly liable for the claimed compensatory damages. The complaint does not allege that there was any concert of action among the defendants or that the acts of any individual defendant constitute a nuisance. The complaint has no allegation of indivisible injury to plaintiffs resulting from concurring acts of defendants nor any allegation that injury would not have resulted but for the concurrence of said acts.

In Count II the complaint prays that the Court "grant them jointly punitive damages against the defendants in the sum of One Million ($1,000,000.00) Dollars from each defendant".

The complaint does not allege any common or individual interest among the several plaintiffs except a *joint* claim for punitive damages which is not a claim upon which relief can be granted. No cause for action exists for a *joint* claim for punitive damages where the underlying claims for compensatory damages are *several* and not joint.

In its memorandum opinion denying motion to dismiss the Court held *inter alia:*

(a) that the plaintiffs would be allowed to aggregate their claims in order to satisfy the jurisdictional amount because the alleged injuries create a common undivided interest among the several plaintiffs;

(b) that the defendants, should liability be proven, are joint tortfeasors;

(c) that the punitive damages alleged by plaintiffs may be considered in the computation of the jurisdictional amount.

The holdings expressed in the Court's Memorandum Opinion are clearly erroneous and are not in accord with Michigan law which this Court is obliged to follow.

Counsel for plaintiffs does not concur and hence it is necessary to bring the motion.

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Butzel, Long, Gust, Klein & Van Zile
By /s/ Leslie W. Fleming
Attorneys for Defendant Allied Chemical Corporation
1881 First National Building
Detroit, Michigan 48226

CERTIFICATION

Robert J. Stowe, Richard Ford and Leslie W. Fleming state that they are the respective attorneys of record for defendants Great Lakes Steel, Detroit Edison Company and Allied Chemical Corporation in this action and represent to the Court that the motion herein is presented in good faith and not for purposes of delay.

/s/ Robert J. Stowe
/s/ Richard Ford
/s/ Leslie W. Fleming

OPINION OF THE COURT

(December 20, 1972)

PROCEEDINGS

The Court: I'm prepared to rule on this if you are prepared to have me rule on it at the present time. Well, I'm going to deny the Motion for rehearing really without indicating whether I believe the Motion is meritorious or not. I think the Keith opinion is the law of this case and I intend to follow it as long as it's there, and I will grant your Motion.

I call that specifically to your attention at this time because I'm going to grant your Motion to whatever weight my certification will have because you have got to get another certification, too, in this case, don't you, in the Court of Appeals? So whatever value that is, I don't associate myself or unassociate myself with the Keith opinion at this point. I view that as the law of this case. I'm not going to upset it.

I will grant your Motion, and I would like you to prepare the Order, if you would at this time, and I will sign it when you sign it and present it to you.

It would be my intention that you do not stop moving along on this. You continue to take your discovery, and so forth. My notes indicate the case is ready for trial the first of January. That's what the pre-trial Order said. That's what you agreed to as of last September, or something like that. Is this correct? Did I read that wrong? It was finally in the sense that as far as it's set, the schedule for trial, and so forth. I could set it for trial. Maybe I'm wrong.

Every case doesn't have to have one of these big fancy pre-trial Orders, though.

All right. Anything more that we can take up here? All right. Get Mr. Hadden's approval as to form on this so I don't really have to think the whole thing through.

All right. Thank you very much gentlemen.

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State of Michigan,
County of Wayne—ss.

I hereby certify that I have reported stenographically the proceedings in the above-entitled matter before the Honorable Charles W. Joiner, at Detroit, Michigan, and that the foregoing transcript, consisting of three (3) pages, is a true, full and accurate record of said proceedings.

/s/ Jerald M. Meyers,
Reporter

Detroit, Michigan

ORDER DENYING DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION WITH CERTIFICATION PURSUANT TO 28 USC 1292(b)

(Filed January 10, 1973)

At a session of said Court held in the Federal Building, Detroit, Michigan on January 10, 1973.

Present Honorable Charles W. Joiner, District Judge.

Defendants Great Lakes Steel, Detroit Edison Company and Allied Chemical moved to dismiss plaintiffs' claims

for lack of jurisdiction for the reason that as between each of the said plaintiffs and each of the defendants the matter in controversy did not exceed the required jurisdictional sums or value of $10,000.00.

The Court filed its Memorandum Opinion Denying Motion To Dismiss wherein the Court held, *inter alia:*

a. that the plaintiffs would be allowed to aggregate their claims in order to satisfy the jurisdictional amount because the alleged injuries create a common undivided interest among the several plaintiffs;

b. that the defendants, should liability be proven, are joint tortfeasors;

c. that the punitive damages alleged (jointly) by plaintiffs may be considered in the computation of the jurisdictional amount.

For the reasons stated in the Memorandum Opinion,

It is Ordered that the defendants' Motions To Dismiss For Lack of Jurisdiction be and the same hereby are denied.

In entering this Order it is the opinion of the Court that the order and the reasons therefor involve controlling questions of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the litigation. Furthermore, the Court believes that an immediate appeal of this order could forestall what would otherwise be a long, complex and costly trial, and that therefore the exceptional situation is present which justifies an immediate appeal pursuant to 28 USC 1292 (b).

It Is Further Ordered that if appeal from this order is perfected, proceedings at the trial level should not be stayed to the extent that discovery may proceed so as not to delay preparation for trial if this order is affirmed.

/s/ Charles W. Joiner
United States District Judge

495 F.2d 213 (1974)

Nos. 73-1405-06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES MICHIE, ET AL.,
Plaintiffs-Appellees,

v.

GREAT LAKES STEEL DIVISION, NATIONAL STEEL CORPORATION, ET AL.,
Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed April 4, 1974.

Before: EDWARDS and CELEBREZZE, Circuit Judges, and KRUPANSKY,* District Judge.

EDWARDS, Circuit Judge. This is an interlocutory appeal from a District Judge's denial of a motion to dismiss filed by three corporations which are defendants-appellants herein. The District Court certified that the appeal presented a controlling issue of law and this court granted leave to appeal under 28 U.S.C. § 1292(b) (1970).

Appellants' motion to dismiss was based upon the contention that each plaintiff individually had failed to meet the requirement of a $10,000 amount in controversy for diversity jurisdiction set forth in 28 U.S.C. § 1332 (1970).[1]

* The Honorable Robert B. Krupansky, United States District Judge for the Northern District of Ohio, sitting by designation.

[1] 28 U.S.C. § 1332 provides:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum

The facts in this matter, as alleged in the pleadings, are somewhat unique. Thirty-seven persons, members of thirteen families residing near LaSalle, Ontario, Canada, have filed a complaint against three corporations which operate seven plants in the United States immediately across the Detroit River from Canada. Plaintiffs claim that pollutants emitted by plants of defendants are noxious in character and that their discharge in the ambient air violates various municipal and state ordinances and laws. They assert that the discharges represent a nuisance and that the pollutants are carried by air currents onto their premises in Canada, thereby damaging their persons and property. Each plaintiff individually claims damages ranging from $11,000 to $35,000 from all three corporate defendants jointly and severally. There is, however, no assertion of joint action or conspiracy on the part of defendants.

Additionally, plaintiffs jointly seek $1,000,000 from each defendant, presumably as exemplary or punitive damages, because the nuisance complained of was "wilful and wanton."

This action was originally brought as a class action under Rule 23 (b)(3) of the Federal Rules of Civil Procedure but when defendants filed a motion to dismiss the class action aspect of the case, plaintiffs conceded the motion and were allowed to substitute allegations of permissive joinder under Rule 20 (a) of the Federal Rules of Civil Procedure. *See Zahn v. International Paper Co.*, — U.S. — (1973) (42 U.S.L.W. 4087 (U.S. Dec. 17, 1973)).

We believe the principal question presented by this appeal may be phrased thus: Under the law of the State of Michigan, may multiple defendants, whose independent actions of allegedly discharging pollutants into the ambient air thereby allegedly create a nuisance, be jointly and severally

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or value of $10,000, exclusive of interest and costs, and is between—

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(2) citizens of a State, and foreign states or citizens or subjects thereof, and . . . ."

liable to multiple plaintiffs for numerous individual injuries which plaintiffs claim to have sustained as a result of said actions, where said pollutants mix in the air so that their separate effects in creating the individual injuries are impossible to analyze.

Appellants argue that the law applicable is that of the State of Michigan and that Michigan law does not allow for joint and several liability on the part of persons charged with maintaining a nuisance. They cite and rely on an old Michigan case, *Robinson* v. *Baugh*, 31 Mich. 290 (1875). They also quote and rely upon RESTATEMENT OF TORTS (FIRST) § 881:

> "Where two or more persons, each acting independently, create or maintain a situation which is a tortious invasion of a landowner's interest in the use and enjoyment of land by interfering with his quiet, light, air or flowing water, each is liable only for such proportion of the harm caused to the land or of the loss of enjoyment of it by the owner as his contribution to the harm bears to the total harm."

They also rely upon the comment under § 881:

> "The rule stated in this Section is applicable whether or not there has been a physical or chemical union of materials and whether or not fumes or polluted matter sent out by the defendant have united with those sent out by others before entry upon the plaintiff's land, since the unity of the means by which the harm is caused does not prevent recovery."

See also 1 T. COOLEY, TORTS § 86 (4th ed. 1932).

Appellees rely strongly upon the opinion of the District Judge in denying the motion to dismiss:

> This court is of the view that this is not the state of the law in Michigan with respect to air pollution. In the absence of any Michigan cases on point, analogous Michigan cases in the automobile negligence area involving

questions of joint liability after the simultaneous impact of vehicles and resultant injuries, are instructive.

In *Watts* v. *Smith*, 373 Mich. 120, quoting *Meier* v. *Holt*, 347 Mich. 430, the Michigan Supreme Court said:

> "Although it is not always definitely so stated, the rules seem to have become generally established that, although there is no concert of action between tortfeasors, if the cumulative effects of their acts is a single indivisible injury which it cannot certainly be said would have resulted but for the concurrence of said acts the actors are to be held liable as joint tortfeasors."

In *Maddux* v. *Donaldson*, 362 Mich. 425 the Michigan Supreme Court cites *Landers* v. *East Texas Salt Water Disposal Company*, 151 Tex. 251, 248 S.W. 2d 731, a pollution case, in support of the above stated proposition. The court indicated that

> ". . . [i]t is clear that there is a manifest unfairness in 'putting on the injured party the impossible burden of proving the specific shares of harm done by each. . . . Such results are simply the law's callous dullness to innocent sufferers. One would think that the obvious meanness [sic] of letting wrongdoers go scot free in such cases would cause the courts to think twice and to suspect some fallacy in their rule of law'."

Plaintiffs contend that the *Maddux*, *id.* and *Watts*, *supra*, language applies here since there is no possibility of dividing the injuries herein alleged to have occurred and that it is impossible to judge which of the alleged tortfeasors caused what harm.

It is the opinion of this court that the rule of *Maddux*, *supra*, and *Landers*, *supra*, cited therein is the better, and applicable rule in this air pollution case.

On this point we affirm the decision of the District Judge. This complaint appears to have been filed under the diversity

jurisdiction of the federal courts. All parties have agreed that Michigan law alone controls.[2]

Like most jurisdictions, Michigan has had great difficulty with the problems posed in tort cases by multiple causes for single or indivisible injuries. *Meier* v. *Helt*, 347 Mich. 430 (1957); *DeWitt* v. *Gerard*, 281 Mich. 676 (1937); *DeWitt* v. *Gerard*, 274 Mich. 299 (1936); *Frye* v. *City of Detroit*, 256 Mich. 466 (1932). *Compare Watts* v. *Smith*, 375 Mich. 120 (1965); *Maddux* v. *Donaldson*, 362 Mich. 425 (1961).

The first four of these cases clearly support the rule of law argued for by appellants. But the last two represent the more recent rule adopted by the Michigan Supreme Court and relied upon by the District Judge.

We believe that the issue was decided in the lengthy consideration given by the Michigan court in the *Maddux* case. There Justice Talbot Smith (now Senior Judge, United States District Court for the Eastern District of Michigan, Southern Division) in an opinion for the court majority (joined by the writer of this opinion) held:

> It is our conclusion that if there is competent testimony, adduced either by plaintiff or defendant, that the injuries are factually and medically separable, and that the liability for all such injuries and damages, or parts thereof, may be allocated with reasonable certainty to the impacts in turn, the jury will be instructed accordingly and mere difficulty in so doing will not relieve the triers of the facts of this responsibility. This merely follows the general rule that "where the independent concurring acts have caused distinct and separate injuries to the plaintiff or where some reasonable means of apportioning

[2] Arguably there may be a federal common law of nuisance applicable to injuries by pollution of water or air across state boundaries. *See Illinois* v. *Milwaukee*, 406 U.S. 91 (1972); *Texas* v. *Pankey*, 441 F.2d 236 (10th Cir. 1971). Thus far, however, no case has been decided under federal nuisance doctrine except where the action has been brought by a state.

Clearly, a suit for injunctive relief could have been (but was not) brought under federal environment law. *See* 42 U.S.C. § 1857 (h)(2) (Supp. 1973)

the damages is evident, the courts generally will not hold the tort-feasors jointly and severally liable."

But if, on the other hand, the triers of the facts conclude that they cannot reasonably make the division of liability between the tort-feasors, this is the point where the road of authority divides. Much ancient authority, not in truth precedent, would say that the case is now over, and that plaintiff shall take nothing. Some modern courts, as well, hold that this is merely the case of the marauding dogs and the helpless sheep relitigated in the setting of a modern highway. The conclusion is erroneous. Such precedents are not apt. When the triers of the facts decide that they cannot make a division of injuries we have, by their own finding, nothing more or less than an indivisible injury, and the precedents as to indivisible injuries will control. They were well summarized in Cooley on Torts in these words: "Where the negligence of 2 or more persons concur in producing a single, indivisible injury, then such persons are jointly and severally liable, although there was no common duty, common design, or concert action." *Maddux* v. *Donaldson*, 362 Mich. 423, 432-33 (1961) (Footnotes omitted.)

The *Maddux* case has been the subject of an extensive annotation wherein the A.L.R. concludes:

> American decisions, statutes, and rules of court have modified and liberalized the common-law rule as to joinder of defendants, and although there is apparently no satisfactory general rule as to when various persons acting independently may be joined in a tort action, many jurisdictions evidently would now permit joinder of two or more drivers who were involved in successive collisions or accidents with a plaintiff or his vehicle. See Am Jur Parties (1st ed §§ 40-43); Am Jur, Negligence (1st ed § 257); Prosser, Torts 2d ed § 46; 1 Harper and James, Torts § 10.1 100 A.L.R.2d 16, 29 n.13 (1965).

We recognize, of course, that the *Maddux* and *Watts* cases both involve multiple collisions causing allegedly indivisible

injuries. Hence, appellants are free to argue that the rule stated does not necessarily apply to the nuisance category of torts with which we deal here. Indeed, appellants call our attention to what appears to be a contrary rule applicable to nuisance cases referred to in the *Maddux* opinion. RESTATEMENT OF TORTS (FIRST) § 881.

In the latest Restatement, however, both the old and the newer rule are recognized and as the Michigan court held in *Maddux*, the question of whether liability of alleged polluters is joint or several is left to the trier of the facts. Where the injury itself is indivisible, the judge or jury must determine whether or not it is practicable to apportion the harm among the tortfeasors. If not, the entire liability may be imposed upon one (or several) tortfeasors subject, of course, to subsequent right of contribution among the joint offenders.

Perhaps the best summary of the rationale for such a rule is found in Harper and James:

> In the earlier discussion of the substantive liability of joint tort-feasors and independent concurring wrongdoers who have produced indivisible harm it was indicated that there were four categories into which these parties may be placed: situations in which (1) the actors knowingly join in the performance of the tortious act or acts; (2) the actors fail to perform a common duty owed to the plaintiff; (3) there is a special relationship between the parties (e.g., master and servant or joint entrepreneurs); (4) although there is no concerted action nevertheless the independent acts of several actors concur to produce indivisible harmful consequences.
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> While the Restatement of Torts contains a short and apparently simple statement of the rule in category four, this type of situation has caused a great deal of disagreement in the courts. Here joint and several liability is sometimes imposed for the harm caused by the independent concurring acts of a number of persons. In all the situations in which such recovery is permitted the

> court must find first that the harm for which the plaintiff seeks damages is "indivisible." This can mean that the harm is not even theoretically divisible (as death or total destruction of a building) or that the harm, while theoretically divisible, is single in a practical sense so far as the plaintiff's ability to apportion it among the wrongdoers is concerned (as where a stream is polluted as a result of refuse from several factories). In the first type of case almost uniformly courts will permit entire recovery from any or all defendants. There is conflict, however, in the second situation, with some well-reasoned recent cases recognizing that the plaintiff's right to recover for his harm should not depend on his ability to apportion the damage but that this is a problem which is properly left with the defendants themselves. 1 F. Harper & F. James, The Law Of Torts § 10.1 at 697-98, 701-02 (1956) (Footnotes omitted.)

The text continues with a detailed discussion of *Landers v. East Texas Salt Water Disposal Co.*, 151 Tex. 251, 348 S.W. 2d 731 (1952), cited by the Michigan Supreme Court in the *Maddux* case and relied upon by the District Court in the instant case. *See* 1 F. Harper & F. James, The Law Of Torts, *supra* at 708-09.

Assuming plaintiffs in this case prove injury and liability as to several tortfeasors, the net effect of Michigan's new rule is to shift the burden of proof as to which one was responsible and to what degree from the injured party to the wrongdoers. The injustice of the old rule is vividly illustrated in an early Michigan case, *Frye v. City of Detroit*, 256 Mich. 446 (1932). There a pedestrian was struck by an automobile, thrown in the path of a street car and struck again. Since his widow could not establish which impact killed him, a verdict was directed against her case.

Since our instant case has not been tried, we do not speculate about what the facts may show, either as to injury or liability. But it is obvious from the briefs that appellant

corporations intend to make the defense that if there was injury, other corporations, persons and instrumentalities contributed to the pollution of the ambient air so as to make it impossible to prove whose emissions did what damage to plaintiffs' persons or homes. Like the District Judge, we see a close analogy between this situation and the *Maddux* case. We believe the Michigan Supreme Court would do so likewise.

In this diversity case Michigan law is not finally and conclusively declared. The District Judge, under *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), had to seek to establish what the Supreme Court of Michigan would do with this case on the basis of what it has already decided. Like the District Judge, we believe that the Michigan courts would apply the *Maddux* principles to the case at bar. Under *Maddux*, each plaintiff's complaint should be read as alleging $11,000 or more in damages against each defendant.[3] Therefore, the principle of *Zahn* v. *International Paper Co.*, — U.S. — (1973) (42 U.S.L.W. 4087 (U.S. Dec. 17, 1973)), which would disallow aggregation of plaintiffs' claims for the purpose of establishing diversity jurisdiction, does not apply to this case.

As to plaintiffs' second count which purports to state a joint $1,000,000 punitive damage claim against all three defendants, we believe that no facts are pled which establish a joint right to punitive damages under Michigan law. On remand plaintiffs may amend to make such claims individually. *Poledna* v. *Bendix Aviation Corp.*, 360 Mich. 129 (1960).

As modified, the judgment of the District Court is affirmed.

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[3] Michigan law, of course, does not allow collection of the judgment more than once. *Maddux* v. *Donaldson*, 362 Mich. 325, 451 (1961) (Black, J., concurring). It also allows for the joint defendant who pays the judgment to seek contribution from his joint tortfeasors. MICH. COMP. LAWS ANN. § 600.2925 (1967).

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES MICHIE, et al, ***Plaintiffs-Appellees,*** **vs.** **GREAT LAKES STEEL DIVISION, NATIONAL STEEL CORPORATION, et al,** ***Defendants-Appellants***	**No. 73-1405-06**

PETITION OF APPELLANT GREAT LAKES STEEL DIVISION, NATIONAL STEEL CORPORATION FOR REHEARING AND SUGGESTION FOR HEARING IN BANC

INTRODUCTION

Now comes GREAT LAKES STEEL DIVISION, NATIONAL STEEL CORPORATION (Great Lakes Steel), one of the Defendants and an Appellant in this matter, and respectfully petitions this Court for a rehearing of these appellate proceedings and this Court's decision of April 4, 1974. Great Lakes Steel further respectfully suggests that a rehearing in banc would be appropriate under the circumstances of this case.

The grounds for such a rehearing are that the Court has overlooked or misapprehended the proper application of the *Erie*[1] doctrine as construed and applied by the Court in *Werthan Bag*,[2] and has thus departed from established precedent in this Circuit.

ARGUMENT

Under the *Erie* doctrine, a Federal Court sitting in a diversity case must follow substantive state law. In determining what the applicable state law may be is particularly difficult where there is

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[1] *Erie v. Tompkins*, 304 US 64 (1938)

[2] *Werthan Bag Corp. v. Agnew*, 202 F2d 119 (6th Cir. 1953)

an absence of a clear pronouncement by the highest state court with respect to the rule of law involved. The Sixth Circuit has, however, established quite clearly the approach to be taken in such a case. The Federal Court must follow the generally recognized rule, not a minority rule; even if the minority rule is emerging and more equitable. This approach was announced in *Werthan Bag, supra,* 21 years ago and remains the established law of this Circuit:

> "In West v. American Telephone & Telegraph Co., 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139, the [Erie] doctrine was extended further to require the federal courts in such cases, where the highest court of the state has not pronounced on the subject, to ascertain from all the available data what the state law is and to apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts.
>
> We think these two opinions of the Supreme Court [*Erie* and *West*] considered together, reveal how strongly the Supreme Court intended to restrict the federal courts in the pronouncement of their own views of the common law when inconsistent with the opinions of the state courts. It would seem that, in the teeth of such intended curtailment, this court would not be privileged to declare the law of Arkansas to be contrary to the *universal law applied in the other states whose courts have spoken on the subject.*" (Emphasis supplied)

In citing *Werthan Bag* with approval, the Tenth Circuit has stated:

> "Where there is a conflict in the decisions of the state courts of our country, the federal court construing the law of the state in question will assume that the courts of that state will follow the weight of authority.
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> * * *
>
> And, we are constrained to say that we agree with some of the criticisms of the majority rule as pointed out in these ar-

> ticles and by the appellant. However, there can be no doubt but what the denial of such action remains the majority rule."[3]

But what is the majority rule to be applied to this case? This Court has cited, in its opinion, the case of *Landers* v *East Texas Salt Water Disposal Co.*,[4] as support for its holding. Although *Landers* is distinguishable from the instant case (because it involved two and only two tortfeasors) it, while adopting a minority rule, also clearly stated the majority rule on the issue in the case at bar:

> "But wth [sic] the exception of Oklahoma and Kansas [citations omitted], the courts of the country seem to be virtually unanimous in refusing to impose joint and several liability on multiple wrongdoers whose independent tortious acts interfere with a landowner's interest in the use and enjoyment of land by interfering with his air or water. *Restatement of the Law of Torts*, Vol. 4, p. 449 sec. 881; Cooley on Torts, 4th Edition, Vol. 1, pp. 283-287; 9 A.L.R. 947-952; 35 A.L.R. 412; 91 A.L.R. 763-765." 151 Tex. at 255, 248 S.W.2d at 733."

This Court has held that on the basis of *Maddux* v *Donaldson*,[5] it believes that the Michigan Supreme Court would apply the principles of joint and several liability to the Defendants in this case. Although *Maddux* did indeed find in favor of joint and several liability, it is quite distinguishable in all other respects. *Maddux* involved actor negligence, not nuisance. *Maddux* involved a few identifiable actors, not hundreds of identifiable and thousands of unidentifiable actors. And most importantly, *Maddux* itself, in adopting the *Restatement* rule on Concurring or Consecutive Independent Acts,[6] specifically referred to the exception thereto contained in §881, which reads:

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[3] *Crigui* v. *Blaw-Knox Corporation*, 318 F2d 811 (10th Cir., 1963). See also, *Beck* v. *F.W. Woolworth Co.*, 111 F.Supp. 824 (N.D. Iowa, 1953), cert. denied, 361 US 913 (1959).

[4] 151 Tex. 251, 348 S.W.2d 731 (1952).

[5] 362 Mich 425, 108 N.W.2d 33 (1961).

[6] *Restatement of Torts* (1939), §879

> "§881. Persons Contributing to a Nuisance. Where two or more persons, each acting independently, create or maintain a situation which is a tortious invasion of a landowner's interest in the use and enjoyment of land by interfering with his quiet, light, air or flowing water, each is liable only for such proportion of the harm caused to the land or of the loss of enjoyment of it by the owner as his contribution to the harm bears to the total harm."

In replying to Appellant's contention that §881 of the Restatement, applicable to nuisance cases, was acknowledged in *Maddux*, this Court stated: "In the latest Restatement, however, both the old and the newer rule are recognized ...". It is respectfully submitted that even if a newer rule is "recognized" in the *Restatement*, that does not make it any the less a minority rule, nor does that lessen the significance of the fact that the *Maddux* court itself "recognized" the majority rule as stated in §881.

In addition, it is fruther submitted that this Court has misapprehended what the latest *Restatement* in fact says. The Court has not cited a specific section of the *Restatement of Torts 2d* in which the "newer rule" is contained. Appellant assumes, however, that the Court was referring to §433B(2), relating to Burden of Proof, which states:

> "(2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor."

The comment and illustration to this section, while referring to pollution situations, do not appear to be applicable to nuisance cases and §433B is therefore not inapposite to §881, which remains unchanged. In addition, even to the extent applicable to negligence or intentional pollution situations, comment e. to §433B(2) states:

> "e. The cases thus far decided in which the rule stated in Subsection (2) has been applied all have involved a small number of tortfeasors, such as two or three. The possibility

arises that there may be so large a number of actors, each of whom contributes a relatively small and insignificant part to the total harm, that the application of the rule may cause disproportionate hardship to defendants. *Thus if a hundred factories each contribute a small, but still uncertain, amount of pollution to a stream, to hold each of them liable for the entire damage because he cannot show the amount of his contribution may perhaps be unjust.* Such cases have not arisen, possibly because in such cases some evidence limiting the liability always has been in fact available."[7] (Emphasis supplied)

In summary, therefore, Appellant Great Lakes Steel respectfully submits that the Court has incorrectly applied *Erie*, as interpreted by *Werthan*. It has adopted a clear minority rule based upon its fear of the hardship which would result to the Plaintiffs from application of the majority rule and it has justified this by speculating that the Michigan Supreme Court would apply the *Maddux* principle to a nuisance case, even though *Maddux* acknowledges the existence of *Restatement of Torts*, §881 to the contrary, which remains unchanged. Appellants therefore can only conclude that the Court has departed from the *Werthan Bag* requirement of "majority rule" and adopted a new interpretation under *Erie* - that a federal court may choose for a state court a "better" or "newer" rule. Appellant submits that if this departure is to be sanctioned, it should be done only by the Court sitting in banc.

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[7] See the Reply Brief of Great Lakes Steel for a discussion of the 108 separate companies or divisions identified by the International Joint Commission as being sources of emissions resulting in significant transboundary movement of air contaminants.

CONCLUSION

For the foregoing reasons, Appellant Great Lakes Steel respectfully requests that this Court grant a rehearing of its decision and opinion of April 4, 1974, and that a rehearing before the Court sitting in banc would be appropriate under the circumstances.

Respectfully submitted,

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Dated: May 1, 1974

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 73-1405-6

JAMES MICHIE, et al,

Plaintiffs-Appellees,

vs.

GREAT LAKES STEEL DIVISION, NATIONAL STEEL CORPORATION, ALLIED CHEMICAL CORPORATION and DETROIT EDISON COMPANY,

Defendants-Appellants

Appeal from United States District Court for the Eastern District of Michigan, Southern Division

PETITION BY ALLIED CHEMICAL CORPORATION FOR REHEARING AND SUGGESTION THAT REHEARING BE IN BANC

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Appellant, Allied Chemical Corporation, petitions for a rehearing to reconsider the judgment entered in this action on April 4, 1974.

I. GROUNDS

This petition is based on the following grounds:

1. In the opinion of petitioner the Court has erroneously assumed that a defendant who would be compelled to pay a judgment entered in this action would have a right to contribution from all persons who contributed to the pollution of the ambient air that caused damage to the plaintiffs' persons or homes.

2. In the opinion of petitioner and assuming the collection of judgments by plaintiffs the ruling of the Court imposing joint and several liability upon a defendant who has no right of contribution and whose emissions merely contributed to the pollution of the ambient air is inequitable, contrary to public policy and permits a taking of property without due process of law.

3. In the opinion of petitioner the Court has erroneously applied as new Michigan law a unique concept based upon a separate and distinctly minority rule.

II. ARGUMENT

Petitioner believes these points are substantial for the following reasons:

A. The Court's opinion clearly states - "Where the injury itself is indivisible, the judge or jury must determine whether or not it is practicable to apportion the harm among the tortfeasors. If not, *the entire liability may be imposed upon one (or several) tortfeasors subject, of course, to subsequent right of contribution among the joint offenders.*" (emphasis added) Slip opinion p 7. The opinion also indicates the Court's view that the defendants (and others contributing to air pollution) are joint tortfeasors and that the Michigan joint contribution statute[11] would be appli-

[11] MCLA 600.2925; MSA 27A.2925.

cable. Slip opinion footnote 3. In the Michigan case relied upon by plaintiffs and the Court, *Maddux* v *Donaldson*, 362 Mich 425 (1961), all the negligent tortfeasors were before the Court. While holding the negligent defendants jointly and severally liable, the Court was concerned with the fact and recognized that the defendants were not joint tortfeasors and referred to them as "concurrent tortfeasors". (p 435)

The defendants herein and the thousands of other contributors of pollution to the ambient air are clearly not joint tortfeasors and the joint contribution statute would have no application. More important is the fact that these defendants had *no* right of contribution. In the recent decision, *Moyses* v *Spartan Asphalt*, 383 Mich 314, 329-332 (1970), the Michigan Supreme Court defined the legal phrase "joint tortfeasor" saying - "In general it was, and still is, that where two (or more) persons owe to another the same duty and by their common neglect of that duty such other is injured, the two (or more) have committed a joint tort and therefore are *joint tortfeasors*". The Court distinguished *joint tortfeasors* from "the acts or omissions of several who act independently rather than in concert" and from those who may be joined and held responsible to the plaintiff "for damages sustained on account of their causally cooperating but non-joint acts or omissions - - -".

The Court in *Moyses* held that the Michigan joint contribution statute provided no substantive right and was not applicable to non-joint wrongdoers. In a judicial pronouncement the Court said:

> "- - - we have decided to overrule what is left of Michigan's common-law bar of contribution between or among 'wrongdoers', wilful or intentional wrongdoers excepted. Such overrulement will leave the issue of contribution to equitable principles as known hitherto and now in matters of express or implied contract. In such regard see Lorimer v. Julius Knack Coal Co. (1929), 246 Mich 214, 217, Comstock v. Potter (1916), 191 Mich 629, and the exhaustive as well as up-to-date treatise of the law of contribution appearing in 18 Am Jur 2d, Contribution, §§ 1-63, pp 6-95, particularly for

the general rules, the prerequisites, the measure and extent of contribution, the apportionment and the application of the law of contribution to particular persons."

Study of the rationale and principles relied upon by the authorities cited quickly reveals the problems involved in any attempt to apply them in an ambulatory cause of action and fact situation presented by pollution of the ambient air by an indeterminate number of sources. It is indisputable that the defendants herein control only a fraction of the indeterminable number of sources of the pollution that resulted in the alleged injuries to the plaintiffs.

Research has failed to turn up a single instance where contribution has been conceived to be applicable except in a situation involving an incident or event involving a finite number of persons whose status and liability for contribution can be determined. The cited authorities all rely upon the premise that the liability will be shared and no one tortfeasor will be liable for more than his *pro rata* share. The premise is succinctly stated in *Lorimer* v *Julius Knack Coal Co.*, cited in *Morses*, supra:

> "It has often been stated by the courts that contribution is founded on principles of equity and natural justice. The doctrine rests on the principle that when parties stand in aequali jure, the law requires equality, which is equity, and one of the parties will not be obliged to bear more than his just share of a common burden or obligation to the advantage of his co-obligors. 13 C.J. p. 821. It is applied in those cases where one or more of several parties equally obligated have done more than their share in performing a common obligation. 'And one who has paid more than his share of the joint obligation may recover contribution from his co-contractors.' Comstock v. Potter, 191 Mich. 629, 637. *But to work out an equitable result, the one seeking contribution should be allowed to recover only the proportionate share from each of the joint obligors from whom contribution can be had.*" (emphasis added) 246 Mich 214, 217.

In the instant case it is not only impossible to determine the proportionate share of each of the offenders but it is impossible to determine the number of offenders who contributed to the alleged injuries and damages. Such impossibilities are readily demonstrated in plaintiffs' (appellees') brief and appendix which cites and makes excerpts from the Joint Air Pollution Study of St. Clair-Detroit River Areas. The excerpts state that injury and damage from air pollution results from particulates, sulphur dioxide and other irritant gases and combinations thereof. These diverse pollutants come from thousands of various sources and in varying amounts.

Moreover, the claims of various plaintiffs extend over periods of several years. The inchoate right of contribution arises at the time each plaintiff's cause of action accrues. 18 Am Jur 2d Contribution pp 65, 66. (See discussion in dissenting opinion J. Black, *Morgan* v *McDermott*, 382 Mich 333, 364 (1969). Contribution depends upon a joint or concurrent obligation or liability. *Board of Cty Rd Comr's, etc Mich* v *American Air, Inc*, (ED Mich) 369 F Supp 698 (1974). The continuine changes in sources and emissions further prohibit any conceivable basis for pro rata contribution for injuries accruing over a period of years.

The principle of contribution is equality in bearing a common burden. Where the circumstance and relations of the plaintiff and those contributing to the cause of plaintiff's injury is such that there is no method of determining equality or the pro rata burden then there is no right of contribution. The defendants herein have no right of contribution under Michigan or federal law and the Court erred in assuming that they would have a right of contribution.

B. The imposition of joint and several liability upon a defendant who has no right of contribution and whose emissions merely contributed to the pollution of the ambient air is inequitable, contrary to public policy and permits taking of property without due process of law.

In the absence of a right of contribution the defendant is compelled to assume the entire burden of the judgment when its pro rata share of the injuries or damage could in actuality only amount to a small fraction under any conceivable circumstances. The result is unquestionably inequitable and contrary to the equitable result intended to be accomplished by allowing contribution among unintentional, non-joint wrongdoers.

The plaintiffs conceded and the Court recognized that the independent acts of many actors besides those of the named defendants concurred to produce the alleged indivisible harm to plaintiffs. The plaintiffs conceded that the acts of each separately might not have been actionable at all. (Appellees br p 4). Yet the effect of the Court's decision is to impose joint and several liability upon a defendant (and others who may be joined) merely upon proof of their emissions contributing to air pollution and without proof that their emissions alone would have caused *some* injury to the plaintiff's person or home.

Thus, without proof of causation and merely upon proof of an unapportioned and independently insignificant contribution to air pollution a defendant may be found liable and saddled with paying the entire amount of the plaintiff's damage.

Where there is causation and certainty of some but indivisible injury caused by each of two or more negligent automobile drivers public policy may support the imposition of joint liability to prevent denial of compensation to the injured plaintiff. But the imposition of joint liability upon actors whose wrongs are unintentional and independently non-injurious is patently inequitable. Requiring such wrongdoers to bear the consequences of the cumulative consequences in an air pollution situation involving thousands or millions of such actors is contrary to public policy. To bear such consequences without contribution is violative of due process.

Contrasted to the automobile impact cases here there is no certainty that injury to a plaintiff was caused at least in part by acts of a particular defendant. In the circumstances of this case with the impossibility of proofs of any causal connection between

the emission source and the injury, a defendant is adjudged and required to pay not just a share but the entire amount of the damage for injuries not shown to have been caused by wrongful conduct attributable to it.

The result does not comport with the essential requirements pertaining to due process of law.

C. The imposition of joint and several liability in the circumstances of this case represents an application of a unique concept as Michigan law. The concept is based upon a separate and distinctly minority rule and its application is contrary to the established policy of federal Courts under *Erie R Co* v *Tompkins*, 304 US 64, 58 S Ct 817, 82 L Ed 1188 (1938).

The Court has affirmed the ruling of the District Court which conceived the application of joint and several liability in this action upon the holding in *Maddux* v *Donaldson*, supra, and its reference to the *Landers* case, supra. The modification of the general rule announced in *Maddux* was expressly limited. In his concurring opinion Justice Black stated:

> "Having signed Mr. Justice Smith's opinion in this case, I would openly avow what was, and what is to be. Until now the Michigan rule has been settled. Where 2 or more wrongdoers separately cause the plaintiff to suffer an unknown or uncertain part or portion of the damages he has shown, each—hitherto—stood responsible to the plaintiff only for the harm caused by his tort, however difficult it may have been to establish the same.
>
> * * *
>
> "These sentiments are recorded solely that lawyers may know that *the former rule is now definitely modified to the extent, and only to the extent,* we now attest by majority vote. *Otherwise such former rule remains in full force.*" (emphasis added).

The limited application of the rule of *Maddux* was discussed in *Watts* v *Smith*, 375 Mich 120 (1965) and it was pointed out that a review of the cases in the annotation in 100 ALR2d 16 established that Michigan's "Maddux rule is contra to that existing in other states". (p 131)

The majority opinion of the Texas Court in *Landers* acknowledged that its view was an exception to the general law followed in almost all states. Moreover, no court is known to have ever applied its holding to air pollution or a situation involving an indeterminable number of sources of pollution.

The imposition of joint and several liability in the circumstances in the instant case is unique among all jurisdictions of the United States. Moreover, the authorities relied upon to support the unique holding are in themselves representative of separate and distinct minority views. In the absence of controlling decisions of the courts of the state where the federal court is sitting, the federal court is obligated to assume the state court would follow the majority rule and the weight of authority. *Werthan Bag Corp* v *Agnew*, 202 F2d 119 (6th Cir, 1953); *Small* v *United States*, 333 F2d 702 (3rd Cir, 1964); *Criqui* v *Blaw-Knox Corp*, 318 F2d 811 (10th Cir, 1963); *United States* v *Jones*, 229 F2d 84 (10th Cir, 1955), cert denied, 351 US 939 (1956); *Hudson* v *American Oil Co*, 152 F Supp 757 (ED Va, 1957), affirmed 253 F2d 27 (4th Cir, 1958).

III. SUGGESTION FOR REHEARING IN BANC

Petitioner respectfully suggests that a rehearing of the appeal in this matter in banc is appropriate for the following reasons:

1. The proceeding involves a question of exceptional importance.

2. There is substantial public interest in the subject matter and the legal issues presented.

3. The declaration of new Michigan law has ramifications far beyond the instant case and will likely influence decisions in other jurisdictions.

4. The decision will affect numerous pending cases, including large class actions, that will be prosecuted long before the issues can be considered by the Supreme Court of Michigan.

5. Affirmance of the judgment of the District Court on the issue presented raises significant problems and questions under the Federal Rules of Civil Procedure, particularly Rules 13(b), 14, 19, 20 and 23.

WHEREFORE, petitioner respectfully requests that this Court grant a rehearing in banc.

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By: Leslie W. Fleming
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Allied Chemical Corporation

Dated: April 30, 1974

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 73-1405-6

JAMES MICHIE, et al,

Plaintiffs-Appellees,

vs.

GREAT LAKES STEEL DIVISION, NATIONAL STEEL CORPORATION, ALLIED CHEMICAL CORPORATION and DETROIT EDISON COMPANY,

Defendants-Appellants

Appeal from United States District Court for the
Eastern District of Michigan, Southern Division

PETITION BY THE DETROIT EDISON COMPANY FOR REHEARING AND SUGGESTION THAT REHEARING BE IN BANC

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The Detroit Edison Company, one of the defendants and appellants, petitions for a rehearing to reconsider the decision handed down in this cause on April 4, 1974, and respectfully shows:

1. *Grounds* – The grounds upon which this petitioner requests a rehearing are identical to those set forth in the petitions being filed this day by the defendants and appellants Allied Chemical Corporation and Great Lakes Steel Division.

2. *Argument* – For its argument this petitioner concurs and adopts the contentions advanced and discussed in detail in said companion petitions.

3. *Suggestion for Rehearing in Banc* – We likewise feel that the issues involved are of sufficient public importance to justify a rehearing by the whole court.

Dated: May 1, 1974

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Nos. 73-1405-06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES MICHIE, et al., *Plaintiffs-Appellees,* vs. GREAT LAKES STEEL DIVISION, NATIONAL STEEL CORPORATION, et al., *Defendants-Appellants.*	ORDER

Before: EDWARDS and CELEBREZZE, Circuit Judges, and KRUPANSKY,* District Judge.

On receipt and consideration of petitions for rehearing and suggestions for rehearing in banc filed by appellants in the above-styled cases; and

No motion for rehearing in banc having been offered by any active judge of this court, the petition for rehearing has been referred to our panel for disposition; and

Noting that no argument is presented which was not previously considered by this court,

Said petitions are hereby denied.

Entered by order of the Court.

John P. Hehman
Clerk

*Honorable Robert B. Krupansky, United States District Judge for the Northern District of Ohio, Eastern Division, sitting by designation.